86-114 (2)

No. ____

Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MELISSA JOHNSON, an infant, by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

RICHARD FRANK*
KATHLEEN PERATIS
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**Counsel of Record*

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of April, one thousand nine hundred and eighty-six.

PRESENT: HON. WALTER R. MANSFIELD,

HON. AMALYA L. KEARSE,

HON. GEORGE C. PRATT

CIRCUIT JUDGES

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually

Docket No. 84-6335

Plaintiffs-Appellants

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel,

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is Affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. SMITH,
Clerk

/s/ Edward J. Guardaro,
by: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of May, one thousand nine hundred and eighty-six.

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Plaintiffs-Appellants,

-against-

UNITED SATES OF AMERICA,

Defendant-Appellee.

Docket No. 84-6335

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants Johnson et al,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND ORDER

CV 84-1406 (EHN)

RICHARD FRANK, P.C.
New York, New York
for plaintiffs

RAYMOND J. DEARIER, United States Attorney
(Kevin P. Simmons, Assitant United States Attorney, of counsel)
Brooklyn, New York
for defendant

NICKERSON, District Judge

Plaintiffs filed this complaint pursuant to the Federal Tort Claims Act (the Act), 28 U.S.C. §1346(b), alleging that

the negligent supervision of government employees caused their injuries. Defendant brings this motion to dismiss and for summary judgment pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure on grounds of sovereign immunity. Because it lacks subject matter jurisdiction the court does not reach the merits of defendant's motion.

The Act permits suits against the government for certain torts committed by government employees acting within the scope of their employment. 28 U.S.C. §1346(b). However, the Act requires the presentation of a claim to the appropriate federal agency and a final denial of that claim as a prerequisite to starting an action in federal court. 28 U.S.C. §2675(a).

Plaintiffs filed a complaint on Standard Form 95 with the United States Postal Service. Their complaint alleged that because of acts occurred on "6/3/82 and varioús dates prior thereto" the plaintiffs suffered personal injuries. Paragraph 11 of Standard Form 95 asks for a description of the accident including "all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and th cause thereof." Plaintiffs completed Paragraph 11 as follows: "Melissa Johnson was sexually molested, assaulted, and, on information and belief, sodomized and threatened by Postman Luis Ojeda. Barbara Johnson sustained damage for medical and psychological treatment and loss of services."

The Postal Service denied plaintiffs' claim, first, because the incident described "occurred while Mr. Ojeda was acting outside the scope of his employment." Second, the agency denied the claim stating that:

> The incident you describe as the basis of your claim is an assault and battery. While Congress has generally waived the Government's immunity for certain wrongful acts of its employees commited (sic) within the scope of their employment, the Congress has specifically provided, in 28 U.S.C. 2680(h), that the Government's immunity from suit and from considering claims for personal injury has not been waived for any claim arising out of an assault and battery.

Plaintiffs then brought this action. Plaintiffs' complaint does not allege assault and battery. While it alleges that Ojeda sexually molested, sodomized and threatened the plaintiff, the theory

of this complaint is that defendant had "notice or knowledge of Ojeda's criminal and perverted propensities" and that defendant's negligence in employing, assigning and supervising Ojeda caused plaintiff's injuries.

Section 2675(a)'s requirement that claimant present their tort claims to the relevant federal agency before suing in federal court is jurisdictional and cannot be waived. Keene Corp. v. United States, 700 F.2d 836, 841 (2d Cir. 1983), cert. denied, 104 S. Ct. 195 (1983). Filing an administrative complaint before filing a civil suit permits the agency best informed about the activity which gave rise to the claim to investigate, evaluate and possibly settle a claim without need for litigation. See. S. Rep. No. 1327, 89th Cong., 2d Sess. 7, reprinted in

1966 U.S. Code Cong. & Ad. News 2515, 2517. This purpose requires that the claim bring "to the Government's attention facts sufficient to enable it thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant." Rise v. United States, 630 F. 2d 1068, 1071 (5th Cir. 1980). The burden is on the claimant to provide adequate factual details of the nature of the claim at the agency level. See Keene, 700 F. 2d at 842. Because the act waives sovereign immunity, this presentment requirement must be strictly adhered to. Id. at 841. Provided the administrative complaint fairly apprises "the Government of the facts leading to the claimant's injury, new theories of why those facts constitute tortious

conduct can be included in a federal court complaint." Rise, 630 F.2d at 1071.

Plaintiffs' administrative complaint made no factual allegations even hinting of negligent supervision. It alleged only that Ojeda assaulted, threatened and molested the infant plaintiff. It did not allege that anyone other than Ojeda might be culpable for their injuries. Nor did it allege that any defendants knew, or had to reason to know, of Ojeda's propensities, or that any defendnat failed to exercise reasonable care in supervising or continuing to employ Ojeda. Yet these are factual elements necessary to a claim of negligent supervision under the relevant New York law. See, e.g., McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947). Section 2675(a)'s presentment requirement means that a plaintiff

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cannot "present one claim to the agency and then maintain suit on the basis of a different set of facts." Dundon v. United States, 559 F. Supp. 469, 476 (E.D.N.Y. 1983).

This action is distinguishable from those in which courts have exercised jurisdiction even through the federal complaints raised different theories of liability from those suggested by the administrative complaints. In those cases, the administrative complaints set forth facts sufficient to warrant agency investigations, which in turn should have produced evidence to put the agency on "constructive notice" of other theories of liability. See, e.g., Rise, 630 F.2d 1068; Rooney v. United States, 634 F.2d 1238 (9th Cir. 1980).

In this action, it is likely that plaintiffs' administrative complaint never triggered an agency investigation since it alleged only that one government employee committed an assault and battery. Indeed, in denying plaintiffs' claim the agency merely cited 28 U.S.C. §2680(h), which specifically provides that the government has not waived its immunity from suit for claims arising out of assault and battery.

Because plaintiffs failed to comply with the presentment requirement of Section 2675(a), this court lacks jurisdiction to entertain the complaint now. See, e.g., Bush v. United States, 703 F.2d 491, 495 (11th Cir. 1983) (court lacks jurisdiction over claim of lack of informed consent since administrative complaint alleged only negligent medical treatment); Heaton v. United

States, 383 F. Supp. 539 (S.D.N.Y. 1974) (court lacks jurisdiction over wife's claim for loss of services since administrative complaint alleged only husband's personal injury). The complaint is dismissed.

So ordered.

Dated: Brooklyn, New York
October 10, 1984

/s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUDGMENT

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs

CV 84-1406 (EHN)

against

UNITED STATES OF AMERICA,

Defendant.

A memorandum and order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on October 12, 1984, dismissing the complaint, it is

ORDERED and ADJUDGED that plaintiffs recover nothing of the defendants

and the complaint is dismissed.

/s/ Robert C. Heinemann
Robert C. Heinemann

DATED:

Brooklyn, New York
October 15, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND ORDER

CV 84-1406 (EHN)

RICHARD FRANK, P.C.
New York, New York
for plaintiffs

RAYMOND J. DEARIE, United States Attorney
(Kevin P. Simmons Assistant United States Attorney, of counsel)
Brooklyn, New York
for defendant

NICKERSON, District Judge

By order dated October 10, 1984 the court dismissed the complaint for lack of jurisdiction. Plaintiff filed a

notice of appeal and, at the same time, a notice of motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Although the appeal was initially dismissed on January 4, 1985 the Court of Appeals for the Second Circuit granted plaintiff's motion to restore the appeal nunc pro tunc.

The filing of a timely notice of appeal divests the court of jurisdiction to entertain a Rule 60(b) motion. Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981); Weiss v. Hunna, 312 F.2d 711, 713 (2d Cir. 1963), cert. denied, 374 U.S. 853 (1963). Accordingly, plaintiffs' motion for

relief from judgment is denied for lack of jurisdiction. So ordered.

DATED: Brooklyn, New York
February 11, 1985

/s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and nagural guardian and BARBARA JOHNSON,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant

SUPPORTING AFFIDAVIT

1984 Civil 1406 (Nickerson,J)

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

RICHARD FRANK, being duly sworn, deposes and says:

1. I represent the plaintiff Melissa Johnson in this action.

2. A day or two after I received a copy of the Court's opinion dismissing the complaint in this matter, I advised the plaintiff's mother of the Court's actions. I did not go into detail with

her as to the grounds for the dismissal, though we agreed to get together as soon as possible so that I could explain to her in detail the reasons for the Court's action.

3. During my early interviews with the infant plaintiff's mother, she told me that the District Attorney had been in touch with her about the actions of the postal employee who had assaulted the infant plaintiff. She told me that an assistant district attorney had told her that the postal employee had prior incidents of this nature on his record, and that the Postal Service was aware of these prior incidents. Thus, it is alleged in the Complaint, on information and belief, that the Postal Service was on notice of its employees' propensities.

4. I was not aware during my preparation of this case, that, indeed, the Postal Service had actually investigated the incident. Not until I spoke with plaintiff's mother last week did she tell me for the first time that there had been a Postal Service investigation. I read her portions of the Court's opinion dismissing the complaint and Mrs. Johnson advised me for the first time that a Postal Service inspector or investigator met with her and her daughter, took statements from both of them and told her he would fully investigate the nature and circumstances surrounding the alleged incident. According to Mrs. Johnson, it simply never occurred to her before to draw a distinction between the criminal investi-

gation, about which she told me, and the agency investigation, which she never mentioned until last week.

/s/ Richard Frank
RICHARD FRANK

Sworn to before me this

7th day of November, 1984

/s/ Carmen Superville
Carmen Superville
Notary Public, State of New York
No. 24-8250025
Qualified in Kings County
Commission Expires March 30, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant

PLAINTIFF DEMANDS A JURY TRIAL

Civ. No. 84-1406

COMPLAINT

Plaintiffs by their attorneys, Richard Frank, P.C., complaining of the above-named defendant, respectfully show to this Court and allege:

JURISDICTION

1. Jurisdiction herein is conferred by Title 28 U.S.C., §1346(b) and §2674, the claim consisting of negligence by employees of the defendant in the course and scope of such employment.

2. Prior hereto, and on or about October 13, 1983, plaintiffs' claims were presented to the United States Postal Service, and were denied on or about January 6, 1984.

FIRST CLAIM

3. On June 3, 1982 and for a period of time prior thereto, the defendant employed one Luis Ojeda as a postman.

4. On June 3, 1982 and prior thereto, Ojeda was assigned as a letter carrier to an area including 3801 Avenue L, Brooklyn, New York.

5. On June 3, 1982 and prior thereto, the defendant, its agents, servants and employees assigned Ojeda to the area including 3801 Avenue L, Brooklyn, New York, with notice or knowledge of Ojeda's criminal and perverted propensities and tendencies, and further with notice or knowledge

of the residential nature of the said area.

6. On various occasions up to and including June 3, 1982, Ojeda sexually molested, sodomized and on information and belief, threatened plaintiff Melissa Johnson, an infant lawfully residing at 3801 Avenue L, Brooklyn, New York.

7. The foregoing was caused by the carelessness, recklessness and negligence of the defendant, its agents, servants and/or employees in the employment, supervision and assignment of Ojeda.

8. As a result of the foregoing, the plaintiff Melissa Johnson has sustained serious personal injuries, to her damage in the amount of Five Million ($5,000,000.00) Dollars.

SECOND CLAIM

9. At all times herein mentioned, plaintiff Barbara Johnson was and is the mother and natural guardian of plaintiff Melissa Johnson and entitled to her services and society.

10. As a result of the carelessness, recklessness and negligence of the defendant, this plaintiff has been deprived of the services and society of the plaintiff Melissa Johnson and has necessarily incurred medical and psychiatric expenses, all to her damage in the amount of One Million ($1,000,000.00) Dollars.

WHEREFORE, judgment is demanded against the above named defendant on the First Claim on behalf of the infant plaintiff in the sum of Five Million

($5,000,000.00) Dollars and on the Second Claim on behalf of the plaintiff Barbara Johnson in the sum of One Million ($1,000,000.00) Dollars, together with the costs and disbursements of this action.

RICHARD FRANK, P.C.
Attorneys for Plaintiff

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New York, New York 10017

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